INDEX

CITATIONS

Cases:

	Page
18th Street Leader Stores v. *United States*, 142 F. 2d 113, certiorari denied, 323 U. S. 725	5
Einson-Freeman Co. v. *Corwin*, 112 F. 2d 683, certiorari denied, 311 U. S. 693	5
Lewis, Charles C., Co. v. *United States*, 14 F. Supp. 471	7
Reo Motors v. *Commissioner*, 338 U. S. 442	4
Spring City Co. v. *Commissioner*, 292 U. S. 182, rehearing denied, 292 U. S. 613	7
United States v. *Garbutt Oil Co.*, 302 U. S. 528	5
United States v. *Michel*, 282 U. S. 656	5

Statutes:

Revenue Act of 1921, c. 136, 42 Stat. 227:

Sec. 202	3, 9
Sec. 234	3, 7, 9

Revenue Act of 1924, c. 234, 43 Stat. 253:

Sec. 203	3, 10
Sec. 204	2, 3, 4, 10
Sec. 234	7, 10

Revenue Act of 1926, c. 27, 44 Stat. 9:

Sec. 203	3, 13
Sec. 204	2, 3, 4, 13
Sec. 234	13
Sec. 284	7, 12
Sec. 1113	5, 12

Revenue Act of 1928, c. 852, 45 Stat. 791:

Sec. 23	4, 13
Sec. 112	3, 13
Sec. 113	2, 3, 4, 13
Sec. 114	2, 4, 13

Miscellaneous:

Rule 38, par. 2, Rules of Supreme Court	1, 2
Treasury Regulations 65, Art. 104	6, 14
Treasury Regulations 69, Art. 104	6, 14

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 728

UNION BLEACHERY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The petition for a writ of certiorari and the supporting brief are in substantial disregard of the requirements of Rule 38, paragraph 2, of the Rules of this Court. Although the headings in the petition itself suggest an attempt formally to comply with the Rules, and there are submitted lengthy specifications of error, the reader, even after careful study, is left uninformed as to the precise matters tendered to this Court for decision on this record. This fault might have been remedied

(though not strictly in compliance with the Rule) by a supporting explanatory brief. But the supporting brief that is submitted is neither "direct" nor "concise" as it is required by the Rule to be; its prolixity stands in the way of its use as a means of enlightenment.

Rule 38 (2) states that a "failure to comply with [its] requirements will be a sufficient reason for denying the petition." It is submitted that the petition in this case should be denied for failure to comply with Rule 38 (2).

In any event, no reason warranting the issuance of a writ of certiorari can be discerned. We need address ourselves only to a few of petitioner's many complaints, the others being, on their face and so far as comprehensible, insufficient bases for certiorari:

1. Petitioner seeks increased depreciation allowances for the years 1923-1928. Under the appropriate statutes, the taxpayer's proper basis for computing depreciation on its depreciable plant properties for 1924-1928, inclusive, was the cost or March 1, 1913, value of the properties owned on that date, whichever is greater, and the cost of properties or additions acquired thereafter. Section 204 (a), (b) and (c), Revenue Acts of 1924 and 1926; Sections 113 (a) and (b) and 114 (a), Revenue Act of 1928 (all Appendix, *infra*, pp. 10-11, 13, 14-15). The proper basis for depreciation for 1923 as to properties owned on March 1, 1913, was

their value on that date, and as to properties acquired thereafter their cost. Sections 202(a) and 234 (a) (7), Revenue Act of 1921 (Appendix, *infra*, p. 9). Taxpayer's effort to prove the March 1, 1913, value of its properties by opinion testimony failed (R. 134-135). It thus did not carry its burden of showing that the fair market value of the property owned on March 1, 1913, was in excess of the cost or book values. Since the Commissioner allowed reasonable depreciation deductions in the taxable years computed on the cost or book values of all the property, both lower courts properly approved these allowances in the absence of proof establishing that the depreciation basis used was too low.

As both lower courts correctly held (R. 292-293, 132-133), taxpayer is not entitled to use as basis the fair market values for all of the properties as of June 30, 1922, or December 31, 1922, since the reorganization in 1922 was simply a change of name and state of incorporation and not a sale of the properties by the predecessor to the taxpayer. The taxpayer, having acquired the assets through a reorganization of the type here involved, is required to use the predecessor's basis for the assets, rather than the fair market value on the date of acquisition as taxpayer argues (Br. 26-28). See Sections 203 (h) (1) (D) and 204 (a) (7), Revenue Acts of 1924 and 1926 (*infra*, pp. 10-11, 13); Sections 112 (i) (1) and 113 (a) (7), Revenue

Act of 1928 (Appendix, *infra*, pp. 13-14). Sections 204 of the 1924 and 1926 Acts and Sections 23 (m) (Appendix, *infra*, pp. 10-11, 13-14), 113 and 114 of the 1928 Act specifically prescribed the basis on which depreciation deductions for the years to which those acts apply are to be computed. They do not provide that the basis for depreciation in 1924-1928 is to be determined by reference to the law applicable to the year (1922) in which the reorganization took place.[1] Hence, in applying the Revenue Acts of 1924, 1926 and 1928, as prescribing the correct basis for computing depreciation in 1924-1928, inclusive, the court below did not bring itself into conflict with this Court's decision in *Reo Motors* v. *Commissioner*, 338 U. S. 442 (cf. Pet. 8, 28), which turned upon highly complex statutory provisions dealing with carry-overs. Furthermore, taxpayer's unsatisfactory opinion evidence failed to establish the fair market values of the assets in 1922 (R. 134-135), even assuming *arguendo*, contrary to the statutory provisions, that the 1922 fair market values represented taxpayer's correct basis.

Since the decision on the merits is correct, it is unnecessary to discuss taxpayer's contention (Br. 12-23) that the two prior decisions determining the

[1] Although the Revenue Act of 1921, which governs the taxable year 1923 only (see *supra*, pp. 2-3), did not contain the specific provision to this effect contained in all the later Acts and the Internal Revenue Code, the same result is required, since the transaction, although called a reorganization, was actually only a change of name and place of incorporation. As will shortly be noted, moreover, the claim with respect to 1923 is, in any event, barred by the statute of limitations.

taxpayer's allowable depreciation for 1916-1922, inclusive, are not *res judicata* for the taxable years.

Finally, as the Court of Appeals held (R. 293), the District Court had no jurisdiction over the suit in so far as it claimed additional depreciation deductions for 1923, 1924 and 1925, under Section 3226 of the Revised Statutes as reenacted by Section 1113 (a), Revenue Act of 1926 (Appendix, *infra*, pp. 12-13), since the suit was not filed within two years after the taxpayer's claims for refund for these years based on the ground of inadequate depreciation allowances were rejected (R. 146-148, 279). Cf. *United States* v. *Michel*, 282 U. S. 656, 659. The second refund claim for 1923 and the third refund claims for 1924 and 1925 merely reiterated the demand for additional depreciation made in the original claims which had already been rejected (R. 146-148) and the taxpayer could not extend the period for filing suit prescribed by Section 3226 by filing other claims based on the same ground after the original claims had been disallowed. *Einson-Freeman Co.* v. *Corwin*, 112 F. 2d 683, 684 (C. A. 2d), certiorari denied, 311 U. S. 693; *18th Street Leader Stores* v. *United States*, 142 F. 2d 113, 115-116 (C. A. 7th), certiorari denied, 323 U. S. 725; cf. *United States* v. *Garbutt Oil Co.*, 302 U. S. 528, 535.

2. The Court of Appeals properly denied (R. 293) taxpayer's claims for additional deductions for repairs for 1924-1928, inclusive (Br. 55-58),

and for additional deductions for South Carolina taxes for 1926-1928 (Br. 58-59). The complaint did not claim such deductions for either item for the years 1927 and 1928 (R. 36-51), and up to the date the District Court entered its final findings of fact, conclusions of law and judgment (R. 156-159, 279-286) the taxpayer does not appear to have raised issues as to such deductions for 1927 and 1928 or as to South Carolina taxes for 1926 (see statement of questions raised at R. 279-280). The claimed additional deductions for repairs for 1927-1928 and South Carolina taxes for 1926-1928 were therefore not properly before the Court of Appeals. The District Court allowed deduction in 1926 of the $9,531.81 now claimed for repairs in that year (R. 157). It had no jurisdiction under Section 3226 of the Revised Statutes to allow additional deductions for repairs in 1924 and 1925 or for South Carolina taxes in 1926, since the taxpayer's original claims for refund presenting these claims were rejected more than two years before the suit was filed. (R. 146-148.) Moreover, there are no findings to support conclusions on the merits (1) that the so-called repairs in 1924 and 1925 were actually incidental repairs, rather than, as the Commissioner determined (R. 255-256), replacements which are depreciable capital items and not deductible (Article 104, Treasury Regulations 65 and 69, Appendix, *infra*, p. 14); or (2) that the South Carolina taxes accrued in 1926-1928 so as to be deductible in those years.

3. The Court of Appeals correctly denied (R. 293) taxpayer's apparent claim (Br. 59-62) for deductions in 1923, 1924, and 1925, in the amounts by which the face value of its accounts receivable exceeded their cost or market value, whichever was lower. The taxpayer properly used in those years the accrual accounting method of reporting the face value of accounts receivable as accrued income and deducting therefrom as bad debts under Section 234 (a)(5), Revenue Acts of 1921 and 1924 (Appendix, *infra*, pp. 9-11) such parts of the receivables as were ascertained to be worthless and charged off. (R. 136.) It is not entitled to exclude or deduct from accrued income the excess of the face amount of the accounts receivable over their cost or market value (*Spring City Co.* v. *Commissioner*, 292 U. S. 182, 184-185, rehearing denied, 292 U. S. 613; *Charles C. Lewis Co.* v. *United States*, 14 F. Supp. 471, 473-474 (D. Mass.)) particularly when such deductions would in effect duplicate the bad debt deductions provided for in Sec. 234(a)(5), and under which taxpayer was allowed deductions (R. 136). Moreover, the claims for refund based on this ground, which were filed June 27, 1931 (R. 147), were not timely as to the taxes paid under the original assessments for 1923-1925 under Section 284 (b) (1), Revenue Act of 1926 (Appendix, *infra*, p. 12) and therefore would not permit recovery, except as to the unrefunded deficiencies in tax for these years paid in 1928 and 1929 (R. 146-148).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
THERON LAMAR CAUDLE,
Assistant Attorney General.
ELLIS N. SLACK,
HELEN GOODNER,
FRANK J. READY,
Special Assistants to the Attorney General.

MAY, 1950.

APPENDIX

Revenue Act of 1921, c. 136, 42 Stat. 227:

SEC. 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * *

SEC. 234. (a) That in computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

* * * * * *

(5) Debts ascertained to be worthless and charged off within the taxable year (or in the discretion of the Commissioner, a reasonable addition to a reserve for bad debts); and when satisfied that a debt is recoverable only in part, the Commissioner may allow such debt to be charged off in part;

* * * * * *

(7) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. In the case of such property acquired before March 1, 1913, this deduction shall be computed upon the basis of its fair market price or value as of March 1, 1913;

* * * * * *

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 203. * * *

(h) As used in this section and sections 201 and 204—

(1) The term "reorganization" means * * * (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or * * * (D) a mere change in identity, form, or place of organization, however effected.

* * * * * *

SEC. 204. (a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * * *

(7) If the property (other than stock or securities in a corporation a party to the reorganization) was acquired after December 31, 1917, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 80 per centum or more remained in the same persons or any of them, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law appli-

cable to the year in which the transfer was made;

* * * * * *

(b) The basis for determining the gain or loss from the sale or other disposition of property acquired before March 1, 1913, shall be (A) the cost of such property * * * or (B) the fair market value of such property as of March 1, 1913, whichever is greater. * * *

(c) The basis upon which * * * exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the same as is provided in subdivision (a) or (b) for the purpose of determining the gain or loss upon the sale or other disposition of such property, * * *.

SEC. 234. (a) In computing the net income of a corporation subject to the tax imposed by section 230 there shall be allowed as deductions:

(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *.

* * * * * *

(7) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence;

* * * * * *

Section 234 (a) (5) of the Revenue Act of 1924 is the same as the corresponding section of the Revenue Act of 1921, above quoted.

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 284. (a) Where there has been an overpayment of any income * * * tax imposed by this Act, * * * the Revenue Act of 1921, or the Revenue Act of 1924, * * * the amount of such overpayment shall, * * * be credited against any income, tax * * * then due * * *, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in * * * [exceptions not material] * * *

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; * * *

* * * * * *

SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, * * * until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pur-

suance thereof; * * * No such suit or proceeding shall be begun * * * after the expiration of five years from the date of the payment of such tax, * * * unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

Sections 203 (h) (1), 204 (a) (7), (b) and (c), and 234 (a) (1) and (7) of the Revenue Act of 1926, are the same as the corresponding sections of the Revenue Act of 1924, above quoted.

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(k) *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence.

* * * * *

(m) *Basis for depreciation and depletion.*—The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be as provided in section 114.

* * * * *

Sections 112 (i) (1), 113 (a) (7) and (b), and 114 (a) of the Revenue Act of 1928 are the same as

Sections 203 (h) (1) and 204 (a) (7), (b) and (c) of the Revenue Act of 1924, above quoted.

Treasury Regulations 65, promulgated under the Revenue Act of 1924:

> ART. 104. *Repairs.*—The cost of incidental repairs which neither materially add to the value of the property nor appreciably prolong its life, but keep it in an ordinarily efficient operating condition, may be deducted as expense, provided the plant or property account is not increased by the amount of such expenditures. Repairs in the nature of replacements, to the extent that they arrest deterioration and appreciably prolong the life of the property, should be charged against the depreciation reserve if such account is kept. * * *

Article 104 of Treasury Regulations 69, promulgated under the Revenue Act of 1926, is the same as Article 104 of Regulations 65, above quoted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1930 095800 002